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CHARLES ELMORE

No. [redacted] 79

Supreme Court of the United States

October Term, 1947

THE E. C. SCHROEDER COMPANY, Incorporated,
Petitioner,

VERSUS

VIRGIL CLARK, for himself and as agent for
JACK F. RICHARDSON ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

W. E. UTTERBACK,
Durant, Oklahoma,

JAMES C. HAMILL,
REUEL W. LITTLE,
Madill, Oklahoma,

Counsel for Petitioner.

June, 1948.

UTTERBACK TYPEWRITING CO., 32 SOUTH WALKER, OKLAHOMA CITY 2, OKLAHOMA

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No. ———

Supreme Court of the United States
(October Term, 1947)

THE E. C. SCHROEDER COMPANY, Incorporated,
Petitioner,

VERSUS

VIRGIL CLARK, for himself and as agent for
JACK F. RICHARDSON ET AL.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE TENTH CIRCUIT

Petitioner prays that a Writ of Certiorari issue to review a judgment of the United States Circuit Court of Appeals for the Tenth Circuit entered on April 24, 1948, affirming the judgment of the District Court of the United States for the Eastern District of Oklahoma.

OPINIONS BELOW

The Findings of Fact and Conclusions of Law in the District Court (R. 22-24) are not reported. The Opinion in the Circuit Court of Appeals (R. 43-44) is not yet officially reported.

JURISDICTION

The judgment of the Circuit Court of Appeals was entered April 24, 1948. The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code as amended by the Act of February 13, 1945.

QUESTIONS PRESENTED

I.

Whether workmen who are engaged in producing cushion and riprap rock at a quarry which is used locally in the same county and state, by a party not engaged in the production of goods for commerce, to construct a dike to prevent anticipated future acts of such party from damaging or destroying the property of a producer of goods for commerce; are engaged in a process or occupation necessary to the production of goods for commerce within the meaning of the Fair Labor Standards Act.

II.

Whether workmen engaged in hauling said cushion and riprap rock to the dike under the circumstances above are covered by the Fair Labor Standards Act.

STATUTES INVOLVED

The Fair Labor Standards Act of 1938 (Act of June 25, 1935, 52 Stat. 1060, 29 U. S. C., Sec. 201 *et seq.*), provides in part as follows:

"Section 3. DEFINITIONS.

"As used in sections 1-19 of this Act.

* * * * * * * *

"(b) 'Commerce' means trade, commerce, transportation, transmission, or communication among the several states or from any State to any place outside thereof.

* * * * * * * *

"(i) 'Goods' means goods (including ships and marine equipment), wares, products, commodities, merchandise, or articles or subjects of commerce of any character, or any part or ingredient thereof, but does not include goods after their delivery into the actual physical possession of the ultimate consumer thereof other than a producer, manufacturer, or processor thereof.

"(j) 'Produced' means produced, manufactured, mined, handled, or in any other manner worked on in any State; and for the purposes of this chapter an employee shall be deemed to have been engaged in the production of goods if such employee was employed in producing, manufacturing, mining, handling, transporting, or in any other manner working on such goods, or in any process or occupation necessary to the production thereof, in any state."

"Sec. 7. MAXIMUM HOURS.

"(a) No employer shall, except as otherwise provided in this section, employ any of his employees who is engaged in commerce or in the production of goods for commerce—

* * * * * * * *

"(3) * * * for a workweek longer than forty hours after the expiration of the second year from such date, unless such employee receives compensation for his employment in excess of the hours above specified at a rate not less than one and one-half times the regular rate at which he is employed."

STATEMENT

By the Act of June 28, 1938 (52 Stat. at L., Chapter 795), the Congress of the United States authorized the construction of the Denison Dam and reservoir on the Red River, a short distance below the point where the Washita empties into the Red River (R. 8).

After the plans and specifications for the dam had been drawn and contracts let and on March 7, 1940, the Cumberland Oil Field was discovered. The discovery well was within about 100 yards of the Washita River and within the area that would be inundated if and when the water that would be caused by the construction of the Denison Dam had accumulated (R. 8). The actual construction of the Denison Dam was commenced about three months after the Cumberland Oil Field was discovered (R. 9).

In the absence of a protective dike, the water that would be backed up from the construction of the Denison Dam would inundate about 60 per cent of the Cumberland Oil Field (R. 9).

The United States, anticipating that the construction of the Denison Dam would inundate the Cumberland Oil Field in part, drew the plans and specifications and let contracts for the construction of the dike to confine the water within the area where it had a lawful right to impound them (R. 9).

The United States did not own any of the oil, gas and mineral rights or any oil and gas leases in the Cumberland Oil Field (R. 9). The operators of the oil field and holders

of the oil, gas and mineral rights did not pay any of the costs of constructing the dike and did not in any way supervise or control the construction of the dike (R. 9).

Since the Denison Dam was to be constructed, or if it was constructed, it would be necessary that a dike or some other suitable means be devised by the United States to protect the oil field (R. 9). There had never been a dike in the location where it was constructed. The dike was an "original or new construction" (R. 9).

The oil from the Cumberland Oil Field moves into interstate commerce (R. 9). Respondents were engaged in producing cushion and riprap rock. The rock was blasted from a strata of Goodland Limestone within one foot to four feet from the top of the ground. Holes were drilled in the strata and dynamite was used to blast the rock from the strata. The rock was then run over a vibrating screen and the large rocks used for riprap and the other rock was transferred to a crusher which broke the rock up into small pieces about 1½" in diameter and was used as rock cushion. The cushion and riprap rock was so produced to be used on the side of the dike to prevent wave erosion from the lake after the water would be impounded (R. 10).

The United States let a contract to W. C. Shepherd & Company for the construction of the dike. W. C. Shepherd & Company sublet the rock work to Lambert Brothers and Lambert Brothers sublet a part of their contract to petitioner herein (R. 10-20).

SPECIFICATIONS OF ERRORS TO BE URGED

The Court below erred:

1. In holding that the quarrying and processing of rock, to be used by a non-producer of goods for commerce, to assist in constructing a new dike, in order that such non-producer's future operations in connection with the construction of a huge dam, would not destroy the property of a producer of "goods for commerce"; constituted the production of goods for commerce within the meaning of the Fair Labor Standards Act.

2. In holding that the haulers of such material were also covered by the Fair Labor Standards Act.

REASONS FOR GRANTING THE WRIT

Obviously, not all activities which are necessary to the production of goods for commerce in the sense of mere causative connection are covered by the Act, for then literally all activities within the country would be covered. Congress did not so intend. On the other hand some activities, while not strictly the physical production of goods, are clearly necessary to such production within the meaning of the Act.

The determination is necessarily one of degree, but this Court has established criteria for the guidance of the administrative authorities, employers and the lower courts. We believe that the decision below wrongly interprets these criteria, and is in conflict with decisions both of this Court and other Circuit Courts of Appeal, and with the Administrator's interpretation of the Act. The decision extends

coverage of the Act far beyond the point reached by any other court, and draws the local operations of material men within the ambit of the statute for the first time. It also extends coverage of the Act to include employees of a non-producer who is simply preventing its acts anticipated in the future from trespassing on a producer of goods for commerce. It therefore presents an important question as to the proper interpretation and application of the Act. On both grounds, we believe that review by this Court is fully warranted.

I.

The decision of the court below extending the coverage of the Act to material men for the dike is in conflict with decisions of this Court and other Circuit Courts of Appeal.

This Court in *Kirschbaum Co.* v. *Walling*, 316 U. S. 517, established the test to be covered by the Act the work of the employees must have:

> "* * * such a close and immediate tie with the process of production for commerce, and * * * therefore so much an essential part of it, that the employees are to be regarded as engaged in an occupation 'necessary to the production of goods for commerce'." 316 U. S. at 525-526.

In *10 East 40th Street Building, Inc.* v. *Callus*, 325 U. S. 578, the boundary as to how far the meaning of "necessary" may go was delineated. In holding that maintenance of an ordinary office building was not activity covered by the Act the Court said:

> " * * * merely because an occupation is indispensable, in the sense of being included in the long chain of causation which brings about so complicated a result as finished goods, does not bring it within the scope of the Fair Labor Standards Act.
>
> * * * * * * * *
>
> " * * * we cannot 'be unmindful that Congress in enacting this statute plainly indicated its purpose to leave local business to the protection of the states.' We must be alert, therefore, not to absorb by adjudication essentially local activities that Congress did not see fit to take over by legislation." 325 U. S. at 582-583.

The decision below is in conflict with these principles. An activity more essentially local can scarcely be imagined than quarrying and transporting rock to a local site where it will remain until the end of time. The chain of causation is long; long beyond anything hitherto encompassed by the Act. The plaintiffs quarried rock; contractors for the United States used the rock in new construction of a dike as part of a dam and reservoir project; the dike when completed would confine water to be impounded by a separate dam to be built; these future waters would, if not confined, spread to an oil field; this would hamper the production of oil; the oil would therefore not move as freely in interstate commerce.

The chain of causation would be one link shorter had the employees been concerned directly with the construction of the dike rather than in quarrying rock for it. Hence the decision below conflicts squarely with the decisions of the Circuit Courts of Appeals that employees engaged in the construction of new buildings where goods for com-

merce will be produced are not engaged in an occupation "necessary" to the production of goods for commerce within the meaning of Section 3(j). *Wells* v. *Ford, Bacon & Davis, Inc.*, 145 Fed. (2d) 240 (C. C. A. 6th), affirming 7 CCH Labor Cases 65,608 (W. D. Ky.) (not officially reported); *Barbe* v. *Cummins Const. Corp.*, 138 Fed. (2d) 667 (C. C. A. 4th), affirming 49 Fed. Supp. 168 (D. Md.); Cf. *Nieves* v. *Standard Dredging Corp.*, 152 Fed. (2d) 719 (C. C. A. 1st) (dredging and fill for future naval base not covered). The Circuit Court of Appeals for the Eighth Circuit considered the case of employees one step further removed than construction workers—that of guards for the premises and materials of a new factory which when completed would produce goods for commerce. The Act was held not to apply. *Noonan* v. *Fruco Const. Co.*, 140 Fed. (2d) 633 (C. C. A. 8th).

The line of authority in the District Courts is unbroken that construction work on new structures which when completed will be used in commerce or in the production of goods for commerce is not an occupation covered by the Act. *Collins* v. *Ford, Bacon & Davis, Inc.*, 9 WHR 346 (E. D. Pa.); *Brue* v. *J. Rich Steers, Inc.*, 60 Fed. Supp. 668 (S. D. N. Y.); *Ritch* v. *Puget Sound Bridge & Dredging Co.*, 60 Fed. Supp. 670 (W. D. Wash.); *Scott* v. *Ford, Bacon & Davis, Inc.*, 55 Fed. Supp. 982 (E. D. Pa.); *Dollar* v. *Caddo River Lumber Co.*, 43 Fed. Supp. 822 (W. D. Ark.); *Muldowney* v. *Seaberg Elevator Co., Inc.*, 39 Fed. Supp. 275 (E. D. N. Y.). *A fortiori*, the production of rock or brick for local construction is not within the Act. *Adams* v. *Wewoka Brick & Tile Co.*, 5 CCH Labor Cases, 63,200 (E. D. Okla.).

Walling v. *Patton-Tulley Transp. Co.*, 134 Fed. (2d) 945 (C C. A. 6th), is not opposed to these decisions, for there the workers who built dikes and revetments on the Mississippi and Missouri rivers were considered to be maintainers of an instrumentality of commerce and therefore engaged in commerce upon the authority of *Overstreet* v. *North Shore Corp.*, 318 U. S. 125. The extension of the Act to the suppliers of material for such maintenance however, is forbidden by *McLeod* v. *Threkeld*, 319 U. S. 491. In this very case, the Court below so ruled. The lower courts have similarly uniformly held that off-the-road workers such as these are not covered though the maintenance workers are. *Ramos* v. *P. R. Cement Corp.*, 10 CCH Labor Cases 68,775 (D. Puerto Rico); *Walling* v. *Craig*, 53 Fed. Supp. 479 (D. Minn.); cf. *Oliphant* v. *Kaser*, 10 CCH Labor Cases 68,570 (District Court of Dallas County, Iowa). In the *Craig* case the Court's conclusion of law as to employees such as these was:

> "Defendants' employees employed off the road and described generally as 'off-the-road employees' who produce and prepare local materials as sand, gravel, rock or earth, or who operate stationary off-the-road bituminous plants, are not engaged in the production of goods for commerce or in commerce or in work so closely related thereto as to be practically a part thereof and are not within the coverage prescribed by the Act." 53 Fed. Supp. at 483.

II.

The decision of the court below that plaintiffs were engaged in the production of goods for commerce is an erroneous construction of an important federal statute.

The production and local transportation of rock which never moves outside the state is not in and of itself production of goods for commerce. *Adams* v. *Wewoka Brick & Tile Co., supra; Walling* v. *Craig, supra; Ramos* v. *P. R. Cement Corp., supra.* Nor is it such production if the dike be regarded as a thing produced, for such a structure does not fall within the meaning of the word "goods" as used in the Act. *Engebretsen* v. *E. J. Albrecht Co.,* 150 Fed. (2d) 602 (C. C. A. 7th). The decision of the Court below therefore must rest entirely on the conception that there existed an integrated effort for the protection of the oil field and that all workers associated in any way with that effort fall within the scope of the Act

This reasoning is a new approach to the coverage of the Act. In *Warren-Bradshaw Co.* v. *Hall,* 317 U. S. 88, this Court held that employees who drilled oil wells part of the way down, but not all the way to the oil, bore a sufficiently "close and immediate tie" to production to fall within the language of the Act. This decision, however, extends that concept to entirely new areas. Here the integrated effort which the court found was not for the production of oil, but for the protection of the field. A local activity which merely supplies materials for such protection—not for production —is deemed to be engaged in the production of goods for commerce.

The Act is "the rule by which employers and workmen must order their daily lives" (*Western Union* v. *Lenroot*, 323 U. S. 490, 508), yet the reasoning of the court below affords no practical test for the guidance of the Administrator or employer. Thus, to the average man, the construction of the dike, if part of an integrated project, would be part of the dam project which would impound the waters which the dike was to restrain rather than a part of oil production. Such theoretical discriminations are mere traps for a businessman, yet a similar question will arise whenever the concept is used to impose liability. For instance, is the digging of ditches for a fire-line system within the concept of protection of production of goods for commerce within the town, or is it part of a purely local project? Does the local supplier of fence posts for a pasture fall within the concept of protection of interstate traffic from roaming cattle or within the concept of farming? Under this rationale, furthermore, the consistent rulings that new construction is not within the Act will be necessarily ignored except in the case of the first factory of a new company, for every later new structure falls within the concept of a part of the integrated effort of the manufacturer to produce goods for commerce.

We repeat that the construction of the dike is not involved: the decision reaches beyond workers on that new structure and applies the Act to workers who quarried and hauled rock for it.

III.

The Questions involved are important.

In the case of *E. C. Schroeder Company* v. *Clifton*, 153 Fed. (2d) 385, Certiorari denied 328 U. S. 858, the Circuit Court of Appeals reversed the judgment of the District Court for the Eastern District and held the plaintiffs in that case to be covered. The same question involved in that case is involved in this case but also there is added in this case the fact as set forth above that respondents have specifically and solemnly admitted that the entire work done in connection with the dike was in order that a third party could confine waters within an area where it had a right to confine them. We think the admission is material. Attention is directed to the fact that the majority opinion of the Court in the *Schroeder* v. *Clifton* case, 153 Fed. (2d) 385, held there was such a close tie with the production of oil that the claimants in that case were covered. In the dissenting opinion by JUDGE PHILLIPS, he set forth and took the view that the work of the claimants in said case was on account of the construction of the dam. In this case, the respondents specifically admit the facts upon which JUDGE PHILLIPS based his opinion. In the *Schroeder* v. *Clifton* case, *supra*, two of the judges held for the claimants and entirely disregarded the fact that a third party actually did the work to prevent its acts from being a trespass on a producer of goods for commerce. In the case before the Court, however, these matters are specifically admitted.

The Administrator in the *Schroeder* v. *Clifton* case filed a brief and on the question of liability at page 2, n. 1, stated:

> " * * * the Administrator is of the view that the (District) Court below correctly held that *construction* of the dyke is a 'process or occupation necessary to the production of oil' the oil for interstate commerce. Consequently, it is the Administrator's view that *if the employees in question spread materials on the construction site or perform other equivalent work in connection with the actual construction of the dam,* their activities are closely enough related to the production of oil for commerce as to be 'necessary' to such production and covered by the Act" (Italics ours).

Petitioner states that the *E. C. Schroeder Company* v. *Clifton* case, *supra,* is erroneous and although this Court denied Certiorari, we feel that with the additional specific stipulation that this Court should have no hesitance in reviewing this case.

The impact of the decision is enormous. The ruling of the court below that off-the-road material men who supply rock for a purely local construction job are covered by the Act because the completed structure will protect future operations of a producer for interstate commerce is sweeping in its effect on industry. The furnishing of material for construction of local fire and water lines, local sewers, or local factories falls within the broad concept, for each can be deemed equally well to have a "close and immediate tie to the integrated effort designed to effectuate * * * continued production * * * and * * * movement in interstate commerce." Never before have such off-the-road material men been deemed to be engaged in occupations necessary to production of goods for commerce, whether the materials were used to make highways and railroads, to construct factories or to be used in any other manner for building

within the state of their origin. Then too, it is specifically admitted in this record that all this work was done by a third party in order to prevent its acts, anticipating the future, from being a trespass on a "producer of goods for commerce." It is specifically admitted in this record that the operators of the oil field and the holders of the mineral rights did not pay any of the costs of the construction of the dike, did not supervise or direct in any way how or when or whether said dike would be constructed. It is further admitted that the builder of the dike had no interests in the oil field, either as an operator or the holder of any mineral rights. We believe this new interpretation as applied in this case violates the clear intent of Congress to leave purely local business to the protection of the states, and the decisions of this Court interpreting the Act.

CONCLUSION

WHEREFORE, it is respectfully requested that this petition for a Writ of Certiorari to the Circuit Court of Appeals for the Tenth Circuit be granted.

W. E. UTTERBACK,
Durant, Oklahoma,

JAMES C. HAMILL,
REUEL W. LITTLE,
Madill, Oklahoma,

Counsel for Petitioner.

June, 1948.

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 551 79

THE E. C. SCHROEDER COMPANY, INCORPORATED, a Corporation,

Petitioner,

VERSUS

VIRGIL CLARK, for himself; and as agent for Jack F. Richardson, John H. Caraway, Floyd L. Jones, L. B. Price, John Doe, Richard Roe and all others similarly situated, employees of the defendant, The E. C. Schroeder Company, Incorporated, a Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

THOS. W. CHAMPION,
LOUIS A. FISCHL,
Ardmore, Oklahoma,
Attorneys for Respondents.

JUNE, 1948.

KING LAW BRIEF COMPANY, 418 NORTHWEST THIRD, OKLAHOMA CITY—PHONE 3-2969

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IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1947

No. 851

THE E. C. SCHROEDER COMPANY, INCORPORATED, a Corporation,

Petitioner,

VERSUS

VIRGIL CLARK, for himself; and as agent for Jack F. Richardson, John H. Caraway, Floyd L. Jones, L. B. Price, John Doe, Richard Roe and all others similarly situated, employees of the defendant, The E. C. Schroeder Company, Incorporated, a Corporation,

Respondents.

RESPONSE TO PETITION FOR WRIT OF CERTIORARI

This is a companion case to *Clifton* v. *Schroeder*, 10 Cir., 153 Fed. (2d) 385, *certiorari* denied 328 U. S. 858, petition for rehearing denied 70 L. ed. 1529. Respondents were co-workers with appellants in the *Clifton case*, on the

same job, for the same employer, doing the same kind of work, at the same times and in carrying out the same contracts.

Below, petitioner insisted upon incorporating in the stipulated facts some of the observations of Judge Phillips in his dissent in the *Clifton case*. It contended below and contends now that such "observations" are stipulated facts which did not appear in the record in the *Clifton case*. If this be true it is to say that Judge Phillips considered facts not shown by the record in his dissent. The trial court found (R. 22):

> "The plaintiffs herein were co-workers performing like duties of the plaintiffs in the case of *M. L. Clifton, etc.* v. *The E. C. Schroeder Co., Inc.*, No. 1282 in this court, 153 Fed. (2d) 385, *certiorari* denied 328 U. S. 858. The facts in this case are the same as those in the *Clifton case* and the issues here were among the issues decided in that suit. Defendant contends that certain admissions made by plaintiffs in the pre-trial stipulation in this case, which were not made in the *Clifton case*, are sufficient to support a result different from that reached by the majority of the Tenth Circuit Court of Appeals on the appeal thereof. Analysis of those 'admissions' referred to discloses that they are not points of material fact which were not before the court in the previous case, but are either inferences or conclusions capable of being drawn from the facts or are recitals of fact that appeared in the testimony and the court's findings of fact although not originally admitted by plaintiffs. The composite fact picture presented to the court now is identical with that before both this court and the appellate court in the *Clifton case*."

Because the issues and facts are the same the trial court concluded as a matter of law that the rule of *stare decisis*

or judicial precedent is the guiding one here, citing *Bigelow* v. *Old Dominion Copper Co.*, 225 U. S. 111, 30 Amer. Jur., Sec. 169, p. 913 (R. 23-24). The Circuit Court affirmed.

Since the decision in *Clifton* v. *Schroeder, supra,* a number of other cases bearing on the liability of the petitioner have been decided. Among these are:

Roland Electric Co. v. *Walling,* 326 U. S. 657, 90 L.ed. 383;
Martino v. *Michigan Window Cleaning Co.,* 327 U. S. 173, 90 L.ed. 603;
Rausch v. *Wolf,* 72 Fed. Supp. 658;
Meeker Cooperative Light & Power Assn. v. *Phillips,* 8th Cir., 158 Fed.(2d) 698;
Walling v. *McCrady Construction Co.,* 3rd Cir., 156 Fed.(2d) 932;
Ritch v. *Puget Sound Bridge & Dredging Co., Inc.,* 9th Cir., 156 Fed.(2d) 334.

After reciting the statute involved and emphasizing the provisions applicable, this Court in the *Roland Electric Company case* said (emphasis by the Court):

> "Every employer shall pay (not less than the required minimum wages) to each of his employees who is employed in any process or occupation necessary to the production, in any state, of any part or ingredient of any articles or subjects of trade, commerce or transportation, of any character, for trade, commerce or transportation among the several States. This *does* not require the employee to be directly 'engaged in commerce' among the several States. This does *not* require the employee to be employed even in the production of an article which itself becomes the subject of commerce or transportation among the several States. It is enough that the employees be employed,

for example, in an occupation which is necessary to the production of a part of any other 'Articles or subjects of commerce of any character' which are produced for trade, commerce or transportation among the several States. This does *not* require an employee to be employed exclusively in the specified occupation. This does *not* require that the occupation in which he is employed be *indispensable* to the production under consideration. It is enough that his occupation be *'necessary to the production.'* There may be alternative occupations that could be substituted for it but it is enough that the one at issue is needed in such production and would, if omitted, handicap the production."

In the *Martino case* this Court said:

"If the services rendered in this case had been rendered by employees of respondent's customers engaged in the production of goods for interstate commerce, those employees would have come under the Act. Respondent's employees are not to be excluded from such coverage merely because their employment to do the same work was under independent contracts. *A. B. Kirschbaum Co.* v. *Walling*, 316 U.S. 517, 524, 86 L.ed. 1638, 1648, 62 S. Ct. 116; *Warren-Bradshaw Drilling Co.* v. *Hall*, 317 U.S. 88, 90, 87 L.ed. 83, 84, 63 S. Ct. 125."

In *Armour & Company* v. *Wantock*, 323 U.S. 126, men who were employed as fire fighters and had nothing to do with the production of goods were held within the Act, the employer being engaged in the business of producing goods for commerce. There the Supreme Court said:

"* * * The occupation is not to be excluded from the Act merely because it contributes to the economy or to continuity of production. * * *"

We believe that by these cases this Court endeavored to set at rest all questions with respect to coverage under the Fair Labor Standards Act where the employee is engaged in the production of goods for commerce or in any occupation necessary thereto.

The application of the Act depends upon the character of the employees' activities and not the business of the employer.

Kirschbaum Company v. *Walling*,
86 L.ed. 1638;
Sykes v. *Lochmann*, 132 Pac.(2d) 620.

The fact that the prime contract was let by the Government does not exempt respondents from the coverage of the Act.

Clyde v. *Broderick*,
114 Fed.(2d) 348 (10 C.C.A.);
Bell v. *Porter*, 159 Fed.(2d) 117;
Alabama v. *King & Boozer*, 86 L.ed. 3.

If the oil companies producing in the Cumberland field had built the dyke, the respondents being their employees, and they being reimbursed by the Government for the money expended, could it be successfully contended such employees would not be entitled to the benefits of the Act because the Government paid the costs of the dyke?

One of the purposes of the statute is to remove burdens upon "the free flow of goods in commerce" and point is made in the *Roland Electric Co. case* that the services of the employees there were rendered during the "flow of

goods in commerce." Likewise here. Oil was being produced from the field for commerce at the time the dyke was constructed and the construction of the dyke was necessary in order that such production of oil for commerce continue. We are not here dealing with a situation where something in the way of a building or structure is being built with the possibility of future use in producing goods for commerce but rather where such work is necessary in order that the flow of goods in commerce, which is in progress, should continue unhampered and unlessened.

The dyke was constructed for a specific purpose. There was no other reason for it. There is no other use for it. Its use cannot be affected by economic factors. It cannot change hands. The goods used in its construction were used for one specific purpose—the continuation of the flow of oil in commerce. They were needed to continue that production of oil for commerce and if omitted would have handicapped that production.

The building of the dyke was in the nature of the maintenance of existing facilities presently used for the production of goods for commerce. Had the dyke not been built those facilities would have been hindered, hampered and probably destroyed. Respondents were engaged in maintaining facilities presently used for the production of goods for commerce.

It was stipulated and found by the trial court (R. 9):

> "In the absence of a dyke or some other suitable means to protect the oil field it would have been partially destroyed in the event the United States continued to go ahead with its plans to construct the Denison Dam and Reservoir. This would have *seriously* hampered the flow of oil from the field."

It is also stipulated that the oil produced from the oil field moved in interstate commerce.

The dam was completed and has been in use for a number of years now, and the dyke serves the purpose for which it was constructed, that is, the protection of the oil field from inundation.

It is therefore respectfully submitted that both upon the question of coverage under the Act and under the rule of *stare decisis* the judgment of the Circuit Court of Appeals is correct.

Respectfully submitted,

THOS. W. CHAMPION,
LOUIS A. FISCHL,
Ardmore, Oklahoma,
Attorneys for Respondents.

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